
5th RISER Conference
**Amendments to the German Data
Protection Act and impacts on the legal
assessment of address pooling**

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Overview: Amendments to the German Data Protection Act

- **Amendment I:** New Regulation for data processing in the field of credit-scoring and for the processing through credit reporting agencies (1st of April 2010)
- **Amendment II:** New Regulation for data processing for purposes of direct marketing, trading of addresses and advertising (1st of September 2009)
- **Amendment III:** Incorporation of the regulation of an European Directive on consumer credits into the German Data Protection Act



Scoring and processing through credit reporting agencies

- The lawmaker aimed at **improving transparency** for the data subjects and more **legal security** for the controllers.
- New regulation contains:
 - § Increased obligations to grant access to personal information. The data subject must be informed about
 - § the individual meaning of the score in reference to the data subject,
 - § the scores that are transferred to third parties,
 - § the categories of data used in the scoring
 - § Explicit Regulation concerning the data flow between controllers and credit reporting agencies, especially for reporting negative information about the data subject.



Direct marketing, trading of addresses, advertising

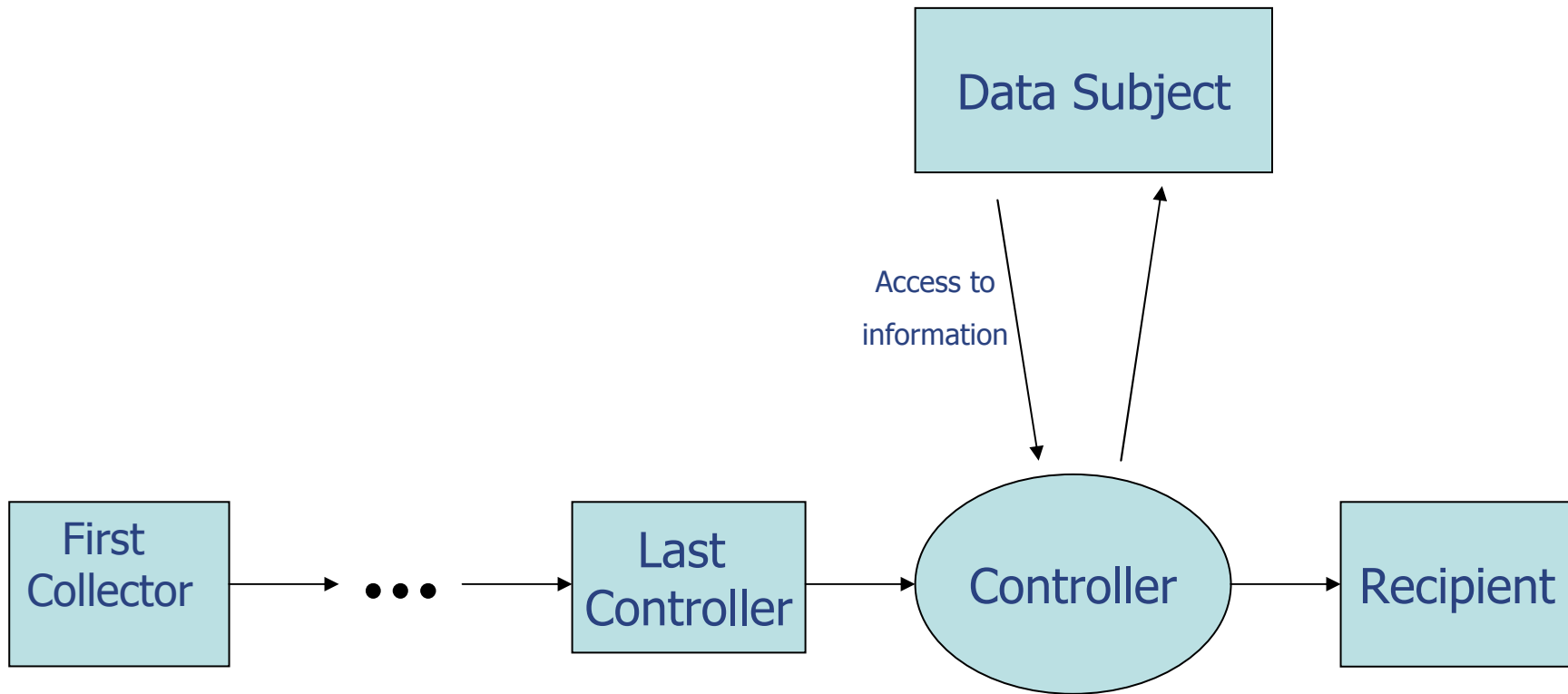
- **Permission Marketing** as a default!
- Without the explicit consent of the data subject data processing for purposes of advertising / direct marketing can be lawful under certain circumstances:
 - § Lists or summaries of data comprising members of a category of persons defined only in terms of the data subject's membership of this category, his or her occupation, name, title, academic degree(s), address and year of birth
 - § Lawful purposes: For offers of the data controller itself, where the controller has collected the data from the data subject or from publicly accessible sources, for purposes of advertising in view of the data subject's occupation and at his or her work address or for purposes of soliciting donations eligible for tax concessions.



Direct marketing, trading of addresses, advertising

- Lists or summaries can be transferred for advertising purposes:
 - § The controller has to **record** where the data has come from and who is the recipient of the data.
 - § Upon request the data subject has to be **granted access to this information.**
 - § The advertisement (marketing letter) must clearly **identify the body** which first collected data from the data subject.
- Without the explicit consent of the data subject, data may be used for the advertising third-party offers, if the data subject can from the advertisement clearly identify the controller responsible for using the data.

Data transfer chain – Transparency fro the data subject





Direct marketing, trading of addresses, advertising

- **General rules:**

- § If data is transferred under the new regulation it may only be processed or used for the purpose it is transferred.
- § Processing for advertising purposes without the consent of the data subject can only be conducted lawfully if it does not conflict with the **legitimate interest** of the data subject.
- § Where opt-in is not necessary, the data subject has the **right to object**. Objection makes the data usage or transfer for purposes of advertising unlawful. The data subject has to be informed about her/his right of objection.



Other relevant amendments:

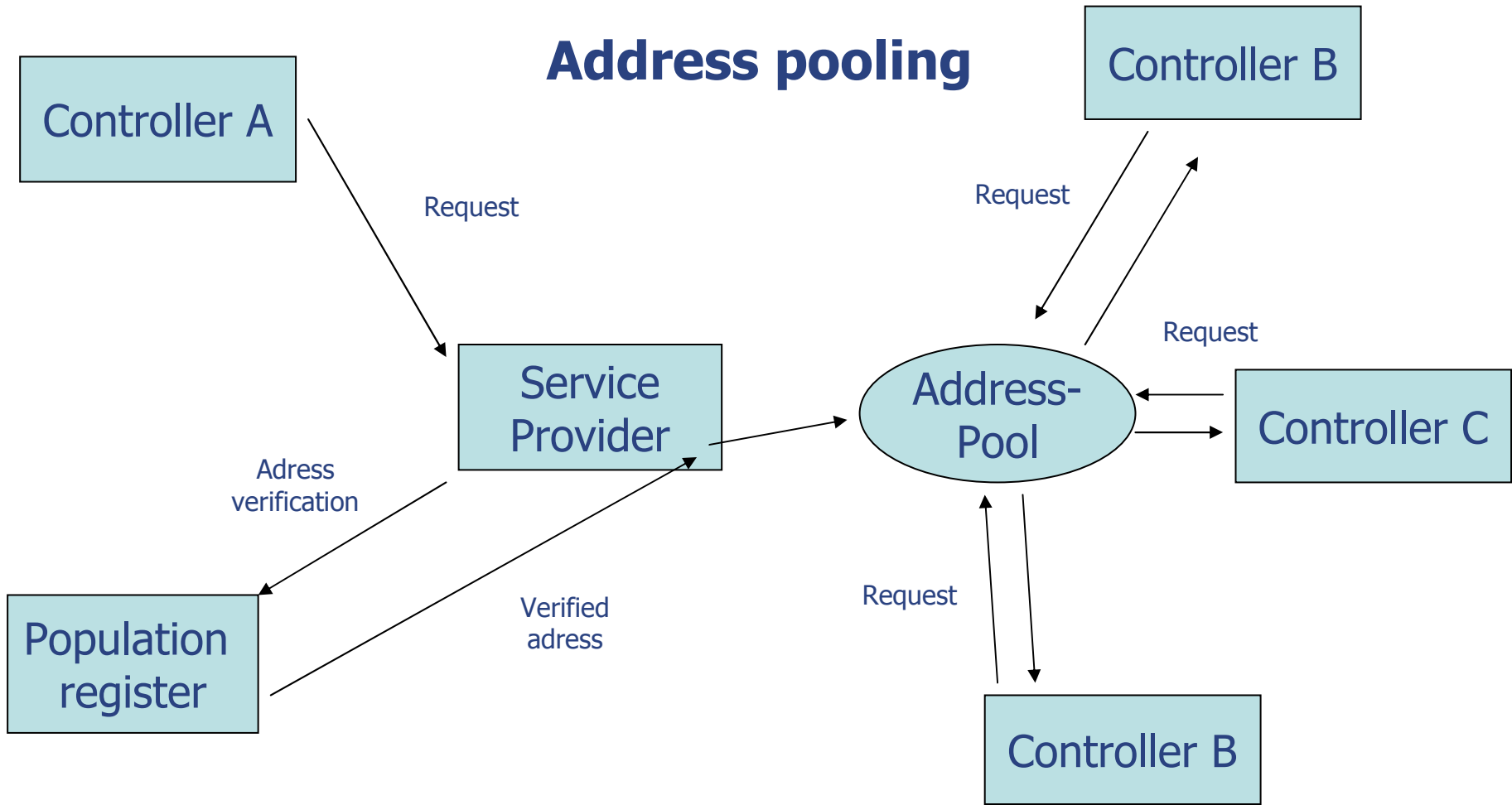
- Processing on behalf of others: More concrete provisions concerning the relationship between the controller and the processor.
- Obligation to notify in case of unlawful access to data
 - § sensible information (bank data, special categories of data, criminal data etc.)
- Increased powers for the data protection authority:
 - § Competence to release an administrative order in cases where data is processed unlawfully.
- A single section with some general statements about the processing of data within the field of employment:
 - § More is to come: The ministry of the interior is working on another amendment concerning the processing of employee data.

Impacts on the legal assessment of address pooling



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Address pooling





Address pooling from the perspective of the German Data Protection Act

- **Different legal perspectives:**

- § **Civil Registration Law:** Legal Grounds for the transfer of verified addresses to a data controller.
- § **German Data Protection Act:** Collecting and saving of verified addresses through a non-public controller must be assessed under the provisions of the German Data Protection Act.



address pooling ***– Controller or Processor***

Is the service provider „processor“ according to Section 11 of the DPA:

- **Service provider is using the data for its own commercial purposes**
 - § not compliant with Section 11 of the DPA which states: *„The processor may collect, process or use the data only as instructed by the controller“.*
- **The requesting controller cannot lawfully instruct the service provider as a processor to transfer the verified addresses to various, unspecified controllers making future requests**
 - § not compliant with Section 11 of the DPA which states: *„The work to be carried out by the processor shall be specified in writing, including in particular ... the extent, type and purpose of the intended collection, processing or use of data, the type of data and category of data subjects“*
 - ⌚ The controller has to specify the instructions with reference to the singular case of data processing. Therefore in case data shall be transferred by the processor the recipient has to be specified by the controller.
- **If a processor is conducting work for different controller, the data must be processed separately (Annex to Section 9 No. 8).**



Address pooling – Commercial Data processing for the purpose of transfer (Section 29 of the DPA)

- Acquiring data from a “generally accessible source”:
 - § Population register as a “generally accessible source” ?
 - § Different opinions
 - § **But:** Information can only be acquired on the grounds of an unambitious **identification** and the access can only be granted under the **condition of proportionality** which could be infringed when the legitimate interests of the data subject is not considered.



Address pooling – Commercial Data processing for the purpose of transfer (Section 29 of the DPA)

- **Clear and overriding legitimate interest in ruling out the possibility of collecting, processing or using data?**
 - § In cases where a legitimate interest arises after the data is acquired from the population register and stored through the private controller, the data subject has no equivalent safeguards that his/her data is not transferred to third parties as he/she would have on the grounds of the civil registry law.
 - § The data subject is by sanction of an administrative offence obliged to notify the population register and inform about his/her personal data
 - ⌘ It is **not proportional** to press the data subject to release data and then let this data being used by private controllers without the data subject's participation.



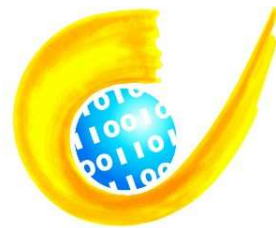
address pooling – Commercial Data processing for the purpose of transfer (Section 29 of the DPA)

- Clear and overriding legitimate interest in ruling out the possibility of collecting, processing or using data?
 - § In the course of address pooling new personal information is generated:
 - § The service provider can establish a **profile of movement** on the ground of the old addresses that are stored.
 - § No transparency for the data subject where this data is stored => in general the service provider do not notify the data subject
 - § Profile of movement for example is used and transferred as information for **creditworthiness assessments** (good/bad neighbourhood)
- ⌘ Overriding legitimate interest.
- ⌘ Section 29 does not give sufficient legal grounds for address pooling.



Thank you for your attention!

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